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<b>T.W., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 16-0176</b>
	)	<b>Issued: January 10, 2018</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VETERANS ADMINISTRATION MEDICAL</b>	)	
<b>CENTER, Philadelphia, PA, Employer</b>	)	
	)	

### Case Submitted on the Record

## DECISION AND ORDER

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

On November 9, 2015 appellant, through counsel, filed a timely appeal from an October 5, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUES**

The issues are: (1) whether appellant met her burden of proof to establish permanent impairment of her right upper extremity due to her accepted lateral epicondylitis, thereby warranting a schedule award; and (2) whether appellant met her burden of proof to establish permanent impairment of the lower extremities, thereby warranting a schedule award.

## **FACTUAL HISTORY**

On May 9, 2011 appellant, then a 50-year-old health technician, filed a traumatic injury claim (Form CA-1) for injuries that arose on May 4, 2011 while turning and repositioning a patient who weighed approximately 250 pounds. She stopped work on May 5, 2011 and received continuation of pay through June 10, 2011, at which time appellant resumed work. On August 24, 2011 OWCP accepted the claim for neck sprain, lumbar sprain, and right lateral epicondylitis.

On January 28, 2014 appellant filed a claim for a schedule award (Form CA-7). No additional evidence was submitted.

By development letter dated February 4, 2014, OWCP requested that appellant provide an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).<sup>3</sup> It afforded appellant 30 days to submit the requested information. Appellant submitted no additional medical reports within the time allotted.

On March 4, 2014 OWCP denied her claim for a schedule award. On March 10, 2014 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on September 11, 2014.

In a February 25, 2014 report, Dr. Stuart J. Goodman, a Board-certified neurologist, noted the history of injury and that appellant had complaints of chronic low back pain radiating down the right lateral thigh region. He reported that a May 24, 2011 lumbar spine x-ray showed mild degenerative changes, a January 8, 2013 electromyogram and nerve conduction velocity (EMG/NCV) study of the right lower extremity was normal with no evidence of lumbosacral radiculopathy or focal neuropathy, and a March 24, 2012 magnetic resonance imaging (MRI) scan of the lumbosacral region was normal. Dr. Goodman noted that, while an October 11, 2012 MRI scan of the pelvis showed no evidence of fracture or dislocation, there was evidence of myotendinous strain involving the right gluteus minimus muscle with prominent tendinosis/partial tearing of the left hamstring attachment at the ischial tuberosity. He provided examination findings and indicated that appellant's left meralgia paraesthetica was causally related to the work injury. Dr. Goodman explained that it was not uncommon for the condition to not be seen in electrodiagnostic studies. Under Table 16-12, he assigned a class 1 with regard to the lateral femoral cutaneous nerve, for five percent permanent impairment of the lower extremity.

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

By decision dated November 24, 2014, an OWCP hearing representative affirmed OWCP's March 4, 2014 decision that appellant had not established a basis for a schedule award. She found that there was no medical evidence which related impairment to the accepted conditions in this case with any rationale.

On June 15, 2015 appellant, through counsel, requested reconsideration.

In a March 31, 2015 report, Dr. Allan H. Macht, a Board-certified general surgeon, diagnosed tendinosis and partial tearing of left hamstrings, right lateral epicondylitis, and flexor tendinitis of the right wrist. He indicated that appellant had reached maximum medical improvement (MMI) by July 31, 2014. Dr. Macht utilized the sixth edition of the A.M.A., *Guides* and opined that appellant had two percent permanent impairment of her right upper extremity and one percent permanent impairment of her left lower extremity.

In a July 18, 2015 report, Dr. Arnold T. Berman, an OWCP medical adviser and Board-certified orthopedic surgeon, reviewed the medical record, including Dr. Macht's March 31, 2015 report. He opined that additional development was needed as there was no orthopedic basis for Dr. Macht's conclusion regarding entitlement to a schedule award. Dr. Berman recommended that a second opinion evaluation be obtained with a Board-certified orthopedic surgeon for a determination of whether appellant had any ongoing abnormalities on examination and, if so, whether additional studies such as MRI scans were necessary.<sup>4</sup>

On August 20, 2015 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a list of questions to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Smith was asked to provide all diagnoses found and explain which, if any, were medically connected to the work injury.

In a September 14, 2015 report, Dr. Smith noted his review of the medical record and reported examination findings. Examination of the neck and back revealed no findings of any spasm, atrophy, trigger points, or deformity and active range of motion was satisfactory and functional without any spasm or rigidity. The neurologic examination of the neck and back was also normal with no focal motor or reflex deficit and no focal atrophy. While appellant complained of radiating pain in her right arm in the region of the triceps muscle down to the olecranon process, no tenderness or complaints of pain over the medial or lateral epicondyles were noted and the elbow had full range of motion without instability or crepitation. The wrist joint was reported as normal with no atrophy in the arm, forearm, or hand. The left lower extremity had no signs of focal atrophy or reflex asymmetry and motor strength was normal in all muscle groups. Appellant also did not complain of pain or any tenderness in the area of the ischial tuberosity.

Given the benign clinical examination, Dr. Smith opined that appellant was at MMI and that the accepted neck and lumbar sprains and right lateral epicondylitis had resolved from an objective basis with no residuals. Also given the benign clinical examination, he opined that it was unnecessary to perform any additional MRI scan studies of her neck, back, or right elbow

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<sup>4</sup> Dr. Berman indicated that, while the MRI scan of the pelvis showed some abnormalities of the gluteus minimus, it was not adequate to make a determination of an injury to the hamstring.

related to this claim. Dr. Smith further opined that appellant's continued complaints could not be verified as being related to any post-traumatic organic process as a consequence of the May 4, 2011 work injury.

Dr. Smith concluded that based on the A.M.A., *Guides* (6<sup>th</sup> ed. 2009) there were class 0 injuries of the right elbow and upper extremities and a class 0 injury to the lower extremities, indicating that appellant had zero percent permanent impairment to the right upper extremity and zero percent permanent impairment to the lower extremities.

In a September 30, 2015 report, OWCP's medical adviser Dr. Berman reviewed the medical record along with Dr. Macht's March 31, 2015 report and Dr. Smith's September 14, 2015 report. He indicated that because Dr. Smith is a Board-certified orthopedic surgeon and Dr. Macht was not, Dr. Smith's opinion represented the weight of the medical evidence. Dr. Berman indicated that Dr. Smith had found that appellant's physical examination was normal, and therefore, the schedule award should be zero with no need for any additional MRI scan studies. Utilizing Dr. Smith's findings, Dr. Berman found that appellant had reached MMI on September 14, 2015. He also opined that appellant had zero percent permanent impairment of her right upper extremity and zero percent permanent impairment of her left lower extremity. Under Table 16-4, page 510,<sup>5</sup> Dr. Berman assigned class 0 for zero percent right and left lower extremity impairment for tendinitis or ruptured tendon with no significant objective abnormal finding of muscle or tendon injury at MMI. Under Table 15-4, page 399, he assigned class 0 for lateral epicondylitis with no significant objective abnormal findings at MMI. Therefore, appellant had zero percent right upper extremity permanent impairment. Under A.M.A., *Guides* 6<sup>th</sup> ed. *The Guides Newsletter*, July/August 2009, Table 2: Spinal Nerve Impairment -- Lower Extremity Impairment, he assigned class 0, zero percent permanent impairment of both the right and left lower extremities as it related to the resolved back strain.

By decision dated October 5, 2015, OWCP denied modification of its prior decision. Determinative weight was given to the opinion of OWCP's medical adviser, Dr. Berman.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA.<sup>6</sup> The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.<sup>7</sup> Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.<sup>8</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice

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<sup>5</sup> Dr. Berman erroneously cited to Table 16-3, the knee regional grid, on page 509.

<sup>6</sup> 5 U.S.C. § 8149.

<sup>7</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>8</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>9</sup>

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled “Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*.” The document included various changes to the original text, intended to serve as an *erratum*/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>10</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

The first issue on appeal is whether appellant established permanent impairment of her right upper extremity due to her accepted lateral epicondylitis.

The Board finds that the case is not in posture for decision as to this issue.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation had been followed regarding the proper use of the diagnosis-based impairment (DBI) or the range of motion (ROM) methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>12</sup> The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.<sup>13</sup> In *T.H.*, the Board concluded that OWCP physicians were at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board observed that physicians have interchangeably cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP’s own physicians were inconsistent in the application of the

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<sup>9</sup> 20 C.F.R. § 10.404; *see also* Ronald R. Kraynak, 53 ECAB 130 (2001).

<sup>10</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

<sup>11</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>12</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>13</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

A.M.A., *Guides*, the Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.<sup>14</sup>

In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the October 5, 2015 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly, and after such other development as may be deemed necessary, OWCP shall issue a *de novo* decision with regard to appellant's claim for an upper extremity schedule award.<sup>15</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.<sup>16</sup> However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.<sup>17</sup> The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment.<sup>18</sup> It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the FECA procedure manual.<sup>19</sup>

When determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.<sup>20</sup> Impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function.<sup>21</sup> If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.<sup>22</sup> There are no provisions for apportionment under FECA.<sup>23</sup> When the prior impairment is due to a previous work-related

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<sup>14</sup> *Supra* note 12.

<sup>15</sup> See FECA Bulletin No. 17-06 (issued May 8, 2017).

<sup>16</sup> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); see *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

<sup>17</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3) (March 2017).

<sup>18</sup> The methodology and applicable tables were initially published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009). *Id.*

<sup>19</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

<sup>20</sup> *Carol A. Smart*, 57 ECAB 340, 343 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

<sup>21</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5d (March 2010).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.<sup>24</sup>

### **ANALYSIS -- ISSUE 2**

The second issue on appeal is whether appellant established permanent impairment of her lower extremity due to the accepted lumbar sprain.

The Board finds the case not in posture for a decision as to this issue.

In a February 25, 2014 report, Dr. Goodman diagnosed left meralgia paraesthetica, which he opined was causally related to the work injury and for which he found five percent permanent impairment of the left lower extremity under the A.M.A., *Guides*. The Board notes that left meralgia paresthetica is not an OWCP-accepted condition. While Dr. Goodman opined that the left meralgia paraesthetica condition was causally related to the work injury, he provided no discussion or rationale as to why such condition was causally related to the May 4, 2011 work injury or how it was causally related to the accepted lumbar sprain. For conditions not accepted by OWCP as being employment related, it is the employee's burden of proof to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such a relationship.<sup>25</sup> Also, Dr. Goodman did not opine that the left meralgia paraesthetica condition was preexisting to the employment injury. As Dr. Goodman provided no rationale for his opinion, his impairment rating is of little probative value.

In a March 31, 2015 report, Dr. Macht, a Board-certified surgeon, diagnosed tendinosis and partial tearing of left hamstrings for which he opined appellant had one percent permanent impairment of her left lower extremity. OWCP did not accept the conditions of tendinosis and partial tearing of left hamstring as employment related.<sup>26</sup> Dr. Macht also did not indicate that the tendinosis and partial tearing of left hamstring were preexisting conditions or whether such conditions were employment related. As previously noted, it is appellant's burden to prove that the condition for which a schedule award is sought is causally related to employment.<sup>27</sup> As such, his lower extremity impairment finding related to those conditions is of little probative value.

In a September 14, 2015 report, Dr. Smith, the second opinion examiner and a Board-certified orthopedic surgeon, indicated that appellant had a benign clinical examination and that her continued complaints could not be verified as being related to any post-traumatic organic process as a consequence of the May 4, 2011 work injury. He found that the accepted lumbar sprain had resolved from an objective basis with no residuals. Under the sixth edition of the A.M.A., *Guides*, Dr. Smith concluded that there was a class 0 injury to the lower extremities which equated to zero percent impairment of the right upper extremity and zero percent

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<sup>24</sup> *Id.* at Chapter 2.808.7a(1); 20 C.F.R. § 10.404(c).

<sup>25</sup> *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

<sup>26</sup> *See id.*

<sup>27</sup> *D.H.*, 58 ECAB 358 (2007).

impairment of the lower extremities. While he generally indicated that he applied the A.M.A., *Guides*, Dr. Smith did not provide an explanation as to how he arrived at the zero percent impairment rating. As he did not reference any tables or pages from the A.M.A., *Guides* in making his impairment determination, Dr. Smith's impairment rating on its face is insufficient to establish the degree of appellant's permanent impairment.<sup>28</sup>

OWCP properly referred appellant's claim to its medical adviser, Dr. Berman, for a determination as to appellant's lower extremity impairment. Utilizing Dr. Smith's findings, Dr. Berman found appellant had reached MMI on September 14, 2015. He also referenced tables and procedures in the A.M.A., *Guides* in determining that appellant had no permanent impairment causally related to her employment injury for the lower extremities. While Dr. Berman referenced Table 16-4, page 510 and assigned class 0 or zero percent left lower extremity impairment for tendinitis or ruptured tendon, as previously noted, OWCP had not accepted the conditions of tendinitis or ruptured tendon as employment related. Thus, this portion of the medical adviser's impairment analysis is irrelevant.

While Dr. Berman properly referenced *The Guides Newsletter*, July/August 2009, Table 2: Spinal Nerve Impairment -- Lower Extremity Impairment for the accepted back strain condition, he summarily concluded that appellant had an assigned class 0 or zero percent impairment of both the right and left lower extremities as it related to the resolved back strain. He did not provide any explanation as to how he arrived at his conclusion. Thus, Dr. Berman's impairment rating on its face is insufficient to establish the degree of appellant's permanent impairment.<sup>29</sup>

It is well established that proceedings under FECA are not adversarial in nature, and while the employee has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>30</sup> Once OWCP undertook development of the evidence by referring appellant to a second opinion physician and an OWCP medical adviser, it had an obligation to do a complete job and obtain a proper evaluation and report that would resolve the issue in this case.<sup>31</sup> The Board will, therefore, set aside OWCP's October 5, 2015 decision and remand the case for the medical adviser to conduct a proper analysis under the A.M.A., *Guides* in order to determine the extent of appellant's lower extremity impairment, if any. After such further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for a lower extremity schedule award.

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

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<sup>28</sup> See *Carl J. Cleary*, 57 ECAB 563 (2006) (an opinion which is not based upon the standards adopted by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of permanent impairment).

<sup>29</sup> *Id.*

<sup>30</sup> *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>31</sup> *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).



**ORDER**

**IT IS HEREBY ORDERED THAT** the October 5, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: January 10, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board